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No. 85-1924

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent does not seriously dispute the existence of a conflict between the Ninth and Eleventh Circuits on the central issue in this case: whether union discipline of a supervisor-member violates Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B), where the union does not represent or have an intention to represent the employees of the supervisor-member's employer. Rather, respondent contends that the petition should be denied because the Board opposed certiorari in the Eleventh Circuit case (*NLRB* v. *IBEW, Local Union No. 323*, 703 F.2d 501, cert. denied, 464 U.S. 950 (1983)) and "[n]othing that has happened in the ensuing three years justifies a different course in this case" (Br. in Opp. 8 (footnote omitted)).

Although, as we have explained (Pet. 11 n.9), the Board had reasonable grounds for opposing the petition for a writ of certiorari in *Local Union No. 323*, three Members of the Court disagreed. See 464 U.S. at 951 (White, J., joined by Brennan, J. and Blackmun, J., dissenting from denial of cert.). In the decision below, the Ninth Circuit has shown that it will continue to adhere to its position, first enunciated in *NLRB* v. *IBEW, Local Union No. 73 (Chewelah)*, 714 F.2d 870 (1980), that a representational interest is required, and that it would not find a violation of Section 8(b)(1)(B) in circumstances where the Eleventh Circuit would. The now-clear conflict on a substantial and recurring issue in the administration of the Act requires resolution by this Court. Moreover, as our petition points out (Pet. 12 n.10), the issue continues to arise in new cases that would be controlled by the Ninth Circuit's rule.[1]

2. Respondent asserts also (Br. in Opp. 6) that "the NLRB is wrong in contending that the decision below is inconsistent with" this Court's decision in *American Broadcasting Cos.* v. *Writers Guild (ABC)*, 437 U.S. 411 (1978). Respondent's position (Br. in Opp. 2) is that Section 8(b)(1)(B) proscribes union discipline of supervisor-members with grievance-handling or collective bargaining responsibilities only if the union "is engaged with [the] employer in the collective bargaining process." Respondent argues (Br. in Opp. 5-6 (emphasis in original)) that *ABC* is not inconsistent with that position or with the decision below for two reasons: (1) because *ABC* did not involve "the situation presented here in which the union does not represent *any* employees of the employers for whom the disciplined supervisor-member works" and (2) *ABC* did not

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[1]In *NLRB* v. *IBEW, Local Union No. 46*, No. 85-7146 (9th Cir. July 1, 1986), the Ninth Circuit, adhering to its *Chewelah* rule, upheld the Board's finding that union discipline of a supervisor-member for working for a nonunion employer violated Section 8(b)(1)(B) because there, unlike here, the union was seeking a contract from the employer.

decide whether Section 8(b)(1)(B) reaches union conduct affecting the choice of supervisors by employers in the absence of a "present or prospective bargaining relationship."

But the lesson of *ABC* is that Section 8(b)(1)(B) is to be read in accordance with its language and its legislative history, neither of which limits its reach to discipline by a union that has or seeks to have a collective bargaining relationship with the employer. *ABC* involved union discipline of supervisor-members who did *not* supervise, or adjust grievances involving, employees represented by the union. Rejecting a claim that the lack of "nexus" between the discipline and the union's representation meant there was no violation, the Court held that Section 8(b)(1)(B) may be violated by conduct that "may adversely affect" either a supervisor's actual performance of collective bargaining or grievance adjustment tasks, *or* his willingness to serve in such a capacity (437 U.S. at 430, 436). The unlawful effect is no less clear where the union seeks to prevent a supervisor-member with collective bargaining or grievance adjustment functions from working for an employer with which it has no relationship; for in that case as well "compliance * * * with the union's demands would have * * * 'the effect of depriving the [employer] of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances.' " *ABC*, 437 U.S. at 436 n.36 (quoting *New Mexico District Council of Carpenters (A.S. Horner, Inc.)*, 177 N.L.R.B. 500, 502 (1969), enforced, 454 F.2d 1116 (10th Cir. 1972)).[2] Thus, although

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[2]In this case, for example, the employer had a bargaining relationship with a union other than respondent (Pet. 3), and the effect of respondent's discipline was to coerce the employer in the selection of its representatives in that relationship. That conduct violates Section 8(b)(1)(B) because, as this Court made clear in *ABC*: "[a] union may no more interfere with the employer's choice of a grievance representative with respect to employees represented by other unions than with respect to

the facts in *ABC* may not be identical to those presented here, the principles underlying that decision support the Board's position that a union may violate Section 8(b)(1)(B) even though it has no representational interest in the employees of the coerced employer. Both respondent and the court below have ignored those principles in taking a contrary view that focuses on the union's motivation rather than on the potential effect on the employer.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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those employees whom it itself represents" (438 U.S. at 439 n.37). Moreover, even if the employer were nonunion and it vested a supervisor with the function of handling employee grievances, a union would violate Section 8(b)(1)(B) if its discipline of that supervisor had the effect of depriving the employer of his services.

This Court's citation of *A.S. Horner*, a case in which the union violated Section 8(b)(1)(B) by fining a supervisor-member because he worked for a nonunion employer, further confirms that the reach of Section 8(b)(1)(B) is not limited to cases where the disciplining union has a collective bargaining relationship with the coerced employer. Although, as respondent notes (Br. in Opp. 8 n. 2), the union in *A.S. Horner* had lost a Board-conducted election several months earlier, the Board's rationale in that case, which was approved by the Tenth Circuit, did not turn on that fact but rather on the circumstance that compliance by the supervisor with the union's demands would have had the effect of depriving the employer of the services of its selected representatives for the purposes of collective bargaining or the adjustment of grievances.